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EATON ELECTRONIC SWITHGEAR SDN BHD v. SUKUMARAN NADASON & ANOR

HIGH COURT MALAYA, PULAU PINANG
COLLIN LAWRENCE SEQUERAH JC
[JUDICIAL REVIEW NO: 25-43-04-2014]
1 SEPTEMBER 2015

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CIVIL PROCEDURE: *Judicial review – Certiorari – Application for – Company terminated employee's employment based on allegation of theft – Industrial Court held that employee was dismissed without just cause or excuse and company ordered to pay compensation in lieu of reinstatement – Application by company to High Court to quash decision of Industrial Court – Whether dismissal was with just cause or excuse – Whether Industrial Court applied correct standard of proof*

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LABOUR LAW: *Employment – Dismissal – Employee dismissed from employment based on allegation of theft – Metal strips found hidden in motorbike carrier – Absence of domestic inquiry – Whether employee given chance to defend himself – Industrial Court held that employee was dismissed without just cause or excuse – Company ordered to pay compensation in lieu of reinstatement – Application by company to High Court to quash decision of Industrial Court – Whether award made by Industrial Court susceptible to judicial review*

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The present application stemmed from an incident where the first respondent, an employee of the applicant, was accused of committing theft when copper strips were found hidden in the first respondent's motorcycle carrier as he was exiting the applicant's factory. Following the incident, the first respondent did not report for duty and consequently, the company issued a letter of termination to him. The applicant lodged a police report and the matter was heard before the Magistrate Court where the first respondent pleaded guilty of the charge under s. 381 of the Penal Code. The first respondent then filed a claim for reinstatement at the Industrial Relations Department under s. 20 of the Industrial Relations Act 1967 and the matter was referred to the Industrial Court ('the second respondent'). The first respondent denied knowledge of the metal strips and submitted that he was denied entry into the factory when he reported to work. The second respondent held that the first respondent was dismissed without just cause or excuse by the applicant and ordered the applicant to pay compensation *in lieu* of reinstatement amounting to RM27,000 and backwages of RM32,400. Dissatisfied, the applicant filed an application for judicial review to quash, by way of *certiorari*, the award of the second respondent on the grounds that (i) the second respondent failed to apply the correct standard of proof; (ii) despite taking into consideration that the applicant's failure to conduct a domestic inquiry was not fatal, the second respondent went on to hold that the first respondent was not given a chance to defend himself; (iii) the second respondent had taken into account an irrelevant consideration namely that the reason the first respondent pleaded guilty before the Magistrate Court was

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because he thought a lesser sentence would be imposed as a result; and (iv) the second respondent erred in holding that there were inconsistencies in the evidence of the applicant's witnesses. A

Held (dismissing application with costs):

(1) The second respondent had stated that the burden of proof on the employer was on balance of probabilities in a case involving an allegation of a criminal misconduct. The second respondent was well-aware of the proper burden to be applied and did not err in law in placing a higher burden on the applicant when using the terms, custody, control and possession in coming to the finding it did. Anything short of the analysis as undertaken by the second respondent in respect of the possession of the copper strips would tantamount to the second respondent resorting to a presumption that because the copper strips were discovered in the carrier of the first respondent's motorbike, he had to be considered as guilty of the said misconduct (paras 34, 38 & 39) B C D

(2) The second respondent's comments on the failure to hold a domestic inquiry was made based on the observation that the applicant failed to conduct any form of adequate investigation such as recording statements of witnesses. What the second respondent was saying was that although the failure to hold a domestic inquiry was not fatal, the failure to conduct proper investigation would impact upon the question of whether the applicant had in fact entertained or evinced a reasonable belief that the first respondent was guilty of the misconduct. (paras 40 & 42) E

(3) Although the second respondent had alluded to the criminal case, it did not materially affect or influence the decision made. The second respondent's decision in holding that the termination was not for just cause or excuse was based on the inconsistencies and contradiction mainly in the evidence of the main witness. In any event, the scope of reference before the second respondent was to inquire as to whether the termination of the first respondent by the applicant was with or without just cause or excuse based upon the available facts known at the time of the dismissal. The plea of guilt was therefore immaterial. (paras 44 & 46) F G

(4) There was no cause to hold that the award made by the second respondent was susceptible to judicial review. The second respondent found that there was a contradiction in relation to the discovery of the alleged stolen copper strips and there was no cogent evidence as to how the copper strips were discovered. The second respondent was entitled to come to the findings it did in the face of contradictions and inconsistencies which did not do anything to advance the credibility on the part of the applicant's witnesses. (paras 50, 52 & 59) H I

Case(s) referred to:

Ambank (M) Bhd v. Menteri Sumber Manusia & Anor And Other Appeal [2014] 1 LNS 686 CA ***(refd)***

Michael Lee Fook Wah v. Menteri Sumber Tenaga Manusia, Malaysia & Anor [1998] 1 CLJ 227 CA ***(refd)***

R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 ***(refd)***

Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 8 CLJ 629 FC ***(refd)***

Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor [2002] 3 CLJ 314 CA ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 25(2)
Industrial Relations Act 1967, s. 20
Penal Code, s. 381
Rules of Court 2012, O. 53 r. 2(2)
Specific Relief Act 1950, s. 44

For the applicant - Ramadass Arumugam; M/s Ramadass & Assocs
For the respondents - Palaniappan M Ramasamy; M/s Palani

Reported by Najib Tamby

JUDGMENT

Collin Lawrence Sequerah JC:

Introduction

[1] This is an application for judicial review filed by the applicant to quash by way of *certiorari* the award of the Industrial Court (second respondent) made on 24 February 2014 which held that the first respondent was unfairly dismissed by the applicant and ordered payment of backwages and compensation to the first respondent.

Salient Facts Of The Case

[2] The material facts of the case as presented by the applicant were as follows. The first respondent commenced employment with the applicant on 14 June 1990 as a production operator.

[3] On 6 August 2008 at 3.30am the applicant's security guard on duty at the main gate was performing his usual duty of checking all the employees leaving the factory premises.

[4] When it came to the first respondent's turn, the security guard told the first respondent to lift up the rain coat in the motorbike carrier so that he could check the carrier but the first respondent refused to do so and when the guard lifted the rain coat a plastic bag containing copper strips dropped to the ground. Upon seeing this the first respondent sped off and accidently hit the security guard's leg.

[5] The security guard then took the copper strips into the security post and called his supervisor Encik Yusof to inspect the copper strips. The first respondent came back and apologised to the security guard and asked the matter not to be reported to the management. The first respondent apologised to Encik Yusof as well.

[6] The security guard then called the human resource manager Cik Fatimah bt Noordin at 8am and reported the incident to her. The human resource manager then instructed the security guard to lodge a police report. She testified in court that when she met the guard she found his leg was bleeding and when she questioned the guard he told her that the first respondent had accidentally knocked his leg. The security guard had also made an entry in his log book about the incident.

[7] The day the incident happened was a Saturday and Sunday was an off day. The human resource manager called the first respondent on 8 September 2008 ie, on Monday several times but there was no answer and he did not report for duty.

[8] The human resource manager then issued the first respondent a letter of termination on the ground that he had committed a serious misconduct on 8 September 2008.

[9] The first respondent then filed a claim for reinstatement at the Industrial Relations Department under s. 20 of the Industrial Relations Act 1967 and since there was no settlement as that department, the YB Minister of Human Resource referred the matter to the Industrial Court (second respondent) for a decision.

[10] It is pertinent to note that the first respondent pleaded guilty for theft at the Magistrate Court on 20 April 2010.

[11] The second respondent handed down its decision on 24 February 2014 holding that the first respondent was dismissed without just cause or excuse by the applicant and ordered the applicant to pay compensation *in lieu* of reinstatement amounting to RM27,000 and backwages of RM32,400.

[12] The first respondent's version on the other hand, was as follows. The claimant on 5 September 2008 was working in the afternoon shift, from 3pm to 11pm, and he was required to do overtime work from 11pm to 3am on the following day.

[13] The claimant averred that it is a practice in the company to call upon afternoon shift workers to continue to work after 11pm till 3am and be paid for overtime work.

[14] The claimant said that he travels to work daily by his motorcycle and parks his vehicle in the factory compound at the designated motorcycle parking lot near the security guard house together with his other co workers. The parking lot is an open space which is not fenced and locked and is freely accessible to anyone.

[15] On 6 September 2008, at about 3am, after having finished his duties for the day, he scanned-out at the canteen where the scanning machine was located.

[16] He said that usually he started his motorcycle and went towards the guard house and stopped his motorcycle for the guard to inspect.

[17] He said that to his surprise the guard went straight for his rain coat which was placed in his motorcycle carrier and pulled it out. This action of the guard made a few metal strips to fall off the rain coat. How the said metal strips were in his rain coat, was beyond his knowledge.

[18] He was shocked and surprised to see the metal pieces, which he later realised it to be copper strips, falling out from his rain coat.

[19] He said that, thereafter, he went home and on reporting to work on 8 September 2008 at about 1.45pm he was denied entry into the factory by the security guard on duty.

[20] It is the claimant's version that he truly believed that the metal pieces may have been placed in his motorcycle basket by any person or persons that are unknown to him. He further stated that he had, on no occasion, had taken any company property for any personal gains throughout his tenure of employment.

Grounds Relied Upon As The Basis For Judicial Review

[21] The principle grounds upon which the applicant's application for judicial review was premised took the following form.

(i) the learned chairman failed to apply her mind to the principle of law that the standard of proof required by the Industrial Court in a criminal related matter is based on balance of probabilities and not beyond reasonable doubt and that is sufficient for the applicant to evince a reasonable belief that the first respondent was guilty of the commission of the misconduct.

(ii) the learned chairman despite taking into consideration the established principle of law that the failure of the applicant to conduct a domestic inquiry was not fatal went on to hold that the first respondent was not given a chance to defend himself and that the applicant failed to conduct a proper investigation before terminating the first respondent and thereby failed to give due consideration to the fact that the human resource manager had interviewed the security guard who was directly involved and further the first respondent had apologised to the guard and to Encik Yusof.

(iii) the learned chairman erred in law when she held that the applicant had failed to prove the charge of possession whereby she held that the applicant had failed to proved that the first respondent had "custody, care and control" of the copper strips and thereby placed a heavy burden of proof on the applicant when the standard of proof required is only on balance of probabilities ie, whether the applicant had a reasonable belief that the first respondent committed the misconduct.

(iv) the learned chairman erred in fact when she held that the evidence tendered by the security guard was inconsistent which was based on a wrong finding of fact whereby she held that the security guard never testified that the first respondent apologised to him as pleaded at para. 9 of the statement in reply and thereby failed to give due consideration to the fact that the security guard did state during the trial that the first respondent had apologised to him and told him not to report the incident to the management.

(v) the learned chairman erred in fact in stating that the evidence tendered by the security guard was inconsistent where in the log book he said that when he lifted the rain coat the copper fell and in the police report he said when he wanted to check the first respondent sped off and the plastic with the copper fell and thereby there is inconclusive evidence on whether the copper strips were found during the search on the first respondent and thereby failed to give due consideration to the relevant fact that the applicant in his statement of case and in his witness statement and during the trial had stated that the guard went straight to rain coat which was in his motorcycle carrier and pulled it out and pieces of metal strip fell off the rain coat onto the ground which confirms the fact that the copper strips were found during the search.

(vi) the learned chairman erred in law when she took into consideration an irrelevant fact ie, the reason the first respondent pleaded guilty on the advice by his lawyer that the charge will be dropped and the fact that the first respondent only pleaded guilty on 20 April 2010 and failed to give due consideration to the fact that there was a trial conducted for four days at the magistrate court and evidence was led pertaining to his guilt where the security guard testified and the first respondent pleaded guilty to avoid a heavier sentence and his allegation that his lawyer advised him to plead guilty was never proven where the first respondent did not call the said lawyer as a witness to prove his allegation.

The Law On Judicial Review

[22] It is well recognised that judicial review is that branch of administrative law by which the High Court exercises its supervisory, as opposed to its appellate powers, over the decisions of inferior tribunals and statutory bodies. The powers vested in the High Court in this country to grant judicial review derives from the Specific Relief Act 1950 and the Courts of

Judicature Act 1964 (CJA 1964) in particular para. 1 of the Schedule to s. 25(2) CJA 1964. This vests the High Court with power to issue to any person of authority directions, orders or writs, including writs of the nature o*f habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any others, for the enforcement of the rights conferred by part II of the Constitution.

[23] In an application for judicial review of a decision of an inferior tribunal or statutory body, the court may make an order for *mandamus*, prohibition or *certiorari*. An order of *certiorari* has the effect of quashing a decision of a judicial or quasi-judicial authority with the intention of restraining any *ultra vires* exercise of powers. An order of *mandamus* is directed to private or municipal corporations, or to any of its officers, commanding the performance of a particular actor duty mandated by law (see s. 44 of the Specific Relief Act 1950). An order of prohibition is directed only against a judicial or quasi-judicial authority in respect of proceedings before them. The applicable procedure that governs applications for judicial review is contained in O. 53 of the Rules of Court 2012 (ROC 2012). An application for judicial review may include a prayer for a declaration (O. 53 r. 2(2) ROC 2012).

The Grounds Upon Which Administrative Action Is Subject To Control By Judicial Review

[24] The traditional position of the law on judicial review is that the remedy is not concerned with reviewing the merits of the decision in which the application for judicial review is made. The remedy of judicial review is primarily a review of the decision making process. In judicial review hearings the court is sitting in its supervisory jurisdiction and not in its appellate jurisdiction. See *Michael Lee Fook Wah v. Menteri Sumber Tenaga Manusia, Malaysia & Anor* [1998] 1 CLJ 227; [1998] 1 MLJ 305, which held as follows:

> First and foremost, it must be emphasised that in an application for *certiorari*, the High Court is not sitting in its appellate jurisdiction but in its supervisory jurisdiction. The court is more concerned with the decision-making process and not the decision itself.
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> [8] The grounds upon which administrative action is subject to control by judicial review has however been widened. In the celebrated case of *Council of Civil Service Unions and Others Appellants v. Minister for the Civil Service Respondent* [1985] A.C. 374, Lord Diplock said as follows:
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> > Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case

> by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.
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> [9] By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable. By "irrationality" I mean what can by now be succinctly referred to as "*Wednesbury* unreasonableness" (*Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards v. Bairstow* [1956] AC 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review. I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.

[25] In our jurisdiction, the landmark decision in *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 AMR 433, exploded the myth that the court's review is only confined to process but not substance. In the Federal Court case of *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629; [2010] MLJU 686 it was held:

> Historically, judicial review was only concerned with the decision making process where the impugned decision is flawed on the ground of procedural impropriety. However, over the years, our Courts have made inroad into this field of administrative law. *Rama Chandran* is the mother of all those cases. *The Federal Court in a landmark decision has held that the decision of inferior tribunal may be reviewed on the grounds of "illegality", "irrationality" and possibly "proportionality" which permits the courts to scrutinise*

A *the decision not only for process but also for substance. It allowed the Courts to go into the merit of the matter. Thus, the distinction between review and appeal no longer holds.*

The *Rama Chandran* decision has been regarded or interpreted as giving the reviewing court a licence to review without restraint decisions for substance even when the said decision is based on finding of facts. (emphasis added)

[26] A recent case which illustrates the province of a court when hearing applications for judicial review is the case of *Ambank (M) Berhad v. Menteri Sumber Manusia & Anor And Other Appeal* [2014] 1 LNS 686 where the Court of Appeal held:

29. The principles governing the approach to be taken in dealing with judicial review applications have been well and authoritatively laid down in a number of cases. Basically the court in such a context was to be mindful that it was not exercising appellate jurisdiction but merely considering whether to extend its 'curial intervention' pursuant to its supervisory jurisdiction (that is, over inferior tribunals or administrative or quasi judicial decision makers).

30. It has been accepted by the courts too that although as a matter of first principle judicial review was concerned primarily with the decision making process (not the merits, substance or justification), there was an exception to that rule where the court could still go behind the decision, where the allegations raised were to the effect that the decision maker had transgressed principles of procedural impropriety, illegality or irrationality (may be even proportionality) in arriving at the impugned decision.

In those circumstances it was open to the court to extend its scrutiny into the area of the merits or justification behind that decision. (emphasis added)

[27] A review of the foregoing cases suggest that the court in cases of this nature exercises supervisory and not appellate jurisdiction and merely confines itself to a review of the decision making process of the inferior body or tribunal. The exception arises in cases where these bodies in arriving at their decision have been guilty of procedural impropriety, illegality or irrationality. A fourth category, namely proportionality has been added to this. Following the decision of the Federal Court in the case *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (supra)*, the previous distinction between review and appeal no longer holds.

Findings

[28] The principle to be applied in dealing with matters involving criminal misconduct of an employee is that the standard of proof required in establishing the charge is on a balance of probabilities and it is sufficient for the employer to evince a reasonable belief that the claimant was guilty of the commission of the misconduct.

[29] This principle has been established in a number of cases the most notable of them being *Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor* [2002] 3 CLJ 314 where after the Court of Appeal reviewed the authorities on the subject held as follows:

> Thus, we can see that the preponderant view is that the Industrial Court, when hearing a claim of unjust dismissal, even where the ground is one of dishonest act, including "theft", is not required to be satisfied beyond reasonable doubt that the employee has "committed the offence", as in a criminal prosecution. On the other hand, we see that the courts and learned authors have used such terms as "solid and sensible grounds", "sufficient to measure up to a preponderance of the evidence," "whether a case ... has been made out", "on the balance of probabilities" and "evidence of probative value". In our view the passage quoted from *Administrative Law* by H.W.R. Wade & C.F. Forsyth offers the clearest statement on the standard of proof required, that is the civil standard based on the balance of probabilities, which is flexible, so that the degree of probability required is proportionate to the nature of gravity of the issue.

[30] The Court of Appeal went on further as follows:

> In *Monie v. Coral Racing Ltd.* [1981] ICR 109, the Court of Appeal in England had to decide an appeal by an employee who had been dismissed for dishonesty. Money was stolen from the employers' safe in circumstances such that only the employee or the assistant manager could have taken it. The employers did not know who was responsible and dismissed them both for dishonesty. The Court of Appeal, dismissing the appeal by the employee held, *inter alia*:
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> > Held, dismissing the appeal, (1) that whether a dismissal based on mere suspicion of an employee's theft was fair depended on whether in all the circumstances of the case the employers had acted reasonably in treating their suspicion as a sufficient reason for dismissing the employee: that such reason was in the circumstances a "reason related to the conduct of the employee"; and that the industrial tribunal, having asked themselves whether there were solid and sensible grounds on which the employers could reasonably suspect dishonesty, were entitled to find that the employers had discharged the onus of proof under paragraph 6(8) of Schedule 1 to the Act (post, pp. 121D, 122G-123E, 124C-G, 126G-127A, D-F, G-128B).

[31] The Court of Appeal also relied on a quote from *Employees' Misconduct as Cause for Discipline and Dismissal in India and the Commonwealth* by Alfred Avins, 1968 edn as follows:

> s. 284 Proof. The British Columbia Supreme Court has ruled that an employer need not prove the guilt of an employee beyond a reasonable doubt to impose disciplinary sanctions, and hence acquittal of theft by a criminal court is no bar to dismissal by the employer. A *fortiori*, an employer need not reinstate an employee dismissed for theft because the conviction

A has been set aside on appeal. As the Hyderabad High Court has remarked: "It is for ... (the employer) to see how far the services of such a suspicious character can be safely continued taking into view... the value of the property with which ... (he) had to deal."

[32] The standard of proof must be sufficient to measure up to a B preponderance of the evidence, taking all reasonable inferences into account.

[33] The standard of proof applicable in a case such as this is therefore on balance of probabilities.

Failure To Apply The Correct Standard Of Proof

C **[34]** A perusal of the award handed down by the second respondent reveals that it recognised and was well aware of the standard of proof applicable to such cases. The second respondent at para. 16 of the award had stated that the burden of proof on the employer was on balance of probabilities in a case involving an allegation of a criminal misconduct. The case of *Telekom* D *Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor (supra)* was referred to in support.

[35] At para. 18 of the award, the first respondent again alluded to the fact that the burden upon the applicant is to be discharged on a balance of probabilities and that they must entertain a reasonable belief that the first E respondent was guilty of the misconduct alleged. Further, at para. 26 of the award, the second respondent held that though the case involves a misconduct of a criminal nature, the burden upon the applicant is not a heavy one but merely on a balance of probabilities.

[36] The second respondent's alluding to the expression "possession" in the F award was in fact referring to the similar expression used in the letter of termination to the first respondent as grounds to terminate him and cannot therefore be faulted in this respect. The subsequent analysis of the evidence in respect of the proof regarding the charge of misconduct can be seen in para. 31 of the award. The substance of the analysis was that as the claimant's G motorbike was parked in an open area ie, unfenced and accessible to others, it cannot be said that the claimant was in full custody, control or possession of the copper strips. It was opined therefore that the possibility of someone else placing the objects in the motorbike basket cannot be excluded. That being the case, the second respondent concluded that the charge of possession H of the copper strips was not proven against the claimant.

[37] Moreover, the fact that there existed the possibility, given the circumstances, that someone else could have placed the objects there would have relevance to the question of whether or not the applicant held a reasonable belief that the first respondent was guilty of the misconduct. The I lack of investigation by the applicant, as will be seen elsewhere, further compounds the applicant's case.

[38] It has been shown earlier that the second respondent was well aware of the proper burden to be applied in a case such as this and the reference to the expression "possession" was unavoidable as this was the very term used as grounds by the applicant to terminate the services of the claimant. I do not therefore see how the second respondent had erred in holding the applicant to a higher standard of proof. Anything short of the analysis as undertaken by the second respondent in respect of the possession of the copper strips would tantamount to the second respondent resorting to a presumption that because the copper strips were discovered in the carrier of the claimant's motorbike, he has to be considered as guilty of the said misconduct. Such a position, as submitted by learned counsel for the first respondent, would not be conducive to industrial harmony, a sentiment with which I find myself in agreement with.

[39] I therefore find that the second respondent had not erred in law in placing a higher burden on the applicant when using the terms, custody, control and possession in coming to the finding it did.

The Second Respondent's Comments On The Failure To Hold A Domestic Inquiry

[40] The applicant submitted that even though the second respondent had taken into consideration the fact that a failure to hold a domestic inquiry was not fatal, nevertheless went on to hold that the first respondent was not given a chance to defend himself and that the applicant had failed to conduct a proper investigation before terminating the first respondent. At para. 28 of the award, the second respondent was cognisant of the fact that the failure to hold a domestic inquiry was not fatal to the applicant's case. However, the second respondent made that observation in the context of the failure of the applicant in conducting any form of adequate investigation such as recording statements of witnesses.

[41] Although the applicant's human resource manager had interviewed COW2, that cannot constitute the extent of their investigation under the circumstances as it must also as a matter of fairness, include taking the statement of the first respondent. It was also observed that the allegation of COW1 that the first respondent had absented himself after the incident cannot hold true as COW1 was possessed of the knowledge that the first respondent was in fact in police custody at the time. Although COW1 testified that he tried to contact the first respondent without success, he also said that he was informed by the investigating officer of the case against the first respondent that the latter was under police custody. It must be remembered that whereas the alleged incident took place on 6 September 2008, the letter of termination was dated 8 September 2008, a mere two days after. It therefore cannot in all fairness be said that there was any or any sufficient investigations done in respect of the alleged incident without taking into account what the first respondent had to say in his defence.

[42] Therefore, taken in its proper context, what the second respondent was saying was that although the failure to hold a domestic inquiry was not fatal, the failure to conduct proper investigation would impact upon the question of whether the applicant had in fact entertained or evinced a reasonable belief that the first respondent was guilty of the misconduct. I therefore find that the second respondent had not erred in this respect.

First Respondent's Plea Of Guilt At The Magistrate Court

[43] The applicant also submitted that the second respondent had taken into account an irrelevant consideration namely, that the reason the first respondent pleaded guilty before the Magistrate Court on a charge of s. 381 of the Penal Code was on the advice of his lawyer that a lesser sentence would be imposed as a result. This fact was never given in evidence by the first respondent. Further, the applicant submitted, the second respondent had erred in holding that the first respondent only pleaded guilty on 20 April 2010. In doing so, the second respondent failed to consider that there was a trial conducted for four days at the Magistrate Court before the first respondent had pleaded guilty to the charge.

[44] The second respondent's decision in holding that the termination was not for just cause or excuse was based on the inconsistencies and contradictions mainly in the evidence of COW2, the main witness in this case. In any event, the scope of reference before the second respondent was to inquire as to whether the termination of the first respondent by the applicant was with or without just cause or excuse based upon the available facts known at the time of the dismissal. The fact of the plea of guilt for whatever reason is therefore immaterial.

[45] As earlier alluded to, in *Employees' Misconduct as Cause for Discipline and Dismissal in India and the Commonwealth* by Alfred Avins, 1968 edn, *(supra)* it was stated that acquittal of theft by a criminal court is no bar to dismissal by the employer and a *fortiori*, an employer need not reinstate an employee dismissed for theft because the conviction has been set aside on appeal. Conversely, just because an employee had pleaded guilty to a charge or for that matter had been found guilty by a criminal court is no reason to hold that he must necessarily be dismissed for that misconduct. Such a position would be in accord with the application of the different burdens involved when dealing with a criminal case on the one hand and a charge of employee misconduct on the other. Any other view would make nonsense of the different burdens applicable to criminal cases and those involving unfair dismissal of employees even where it concerns a misconduct of a criminal nature.

[46] Although the second respondent had alluded to the criminal case, it did not materially affect or influence the decision made. It can clearly be seen that the reason for holding that the applicant had no reasonable cause to entertain a belief that the first respondent was guilty of criminal misconduct was based upon other cogent reasons.

Inconsistencies In The Evidence Of The Applicant's Witnesses

[47] In the course of the award, the second respondent had alluded to the inconsistencies and contradictions in the evidence of the applicant's witnesses in coming to the finding that the applicant had failed on a balance of probabilities in proving the alleged misconduct of the first respondent. These findings, it must be emphasised were findings of fact made by the second respondent after listening and witnessing first-hand the testimonies of the witnesses. Such audio-visual advantage is something not enjoyed by this court and in exercising supervisory jurisdiction it is not the province of this court to lightly embark and interfere upon a detailed analysis afresh of the findings of fact made unless it can plainly be demonstrated that such findings were not in accord with the evidence on record so as to be plainly wrong and led to a decision that no reasonable tribunal similarly circumstanced would arrive at.

[48] COW2, the security guard employed by the applicant, in the course of giving evidence before the second respondent, in describing the incident that took place testified that on 6 September 2008 at about 3am he conducted an inspection on the first respondent as the latter was about to exit the applicant's premises. The first respondent was at the time on his motorbike registration no. PFR 1677. As COW2 was about to examine the first respondent, the latter accelerated "memecut" his motorbike and in so doing a plastic package fell off the said motorbike. Later on in evidence COW2 stated that he had requested the first respondent to lift the rain coat in his motorbike carrier but he refused as he said he did not have anything. COW2 then testified that he lifted up the rain coat and the first respondent became startled and the plastic package containing the copper strips then fell. COW2 further said that his leg was injured as a result of coming into contact with the first respondent's motorbike.

[49] COW2 testified there were two reports made by him regarding the incident. One was in a log book and the other in the police report lodged by him. In the log book, COW2 reported "ketika mengangkat baju hujan ia memecut dengan laju ketika itu jatuh batang tembaga ..." translated as follows "when the rain coat was lifted, he accelerated with speed and the copper strips fell off". In the police report lodged, COW2 reported" ... semasa saya mahu periksa tiba-tiba lelaki India itu terus memecut motosikalnya PFR 1677 dan semasa itu saya dapati ada satu bungkusan plastik yang terjatuh dari motosikal beliau ..." translated as " ... at the time I wanted to inspect, suddenly the Indian man accelerated his motorbike PFR 1677 and a plastic package fell from his motorbike ...".

[50] The second respondent found that there existed a contradiction in relation to the discovery of the alleged stolen copper strips.

[51] The second respondent reasoned as follows. If the contents of what was stated in the log book are examined carefully, it is clear that if it was true that the first respondent accelerated in a speedy manner, it is not possible for COW2 to get hold of the rain coat in the carrier of the motorbike.

[52] On the other hand, reasoned the second respondent further, the police report clearly shows that at the time COW2 wanted to conduct the inspection, the package containing the copper strips suddenly fell from the motorbike. The second respondent found that the said contradictions were material and that there was no cogent evidence as to how the copper strips were discovered. These inconsistencies were further compounded when considering the fact that COW2 had never mentioned in his police report about the rain coat.

[53] The second respondent in the award stated that it was cognisant of the fact that police reports are only to contain such material facts as are necessary to enable the police to commence investigations. However, based upon the police report what can be gathered is that the plastic package fell when the first respondent accelerated his motorbike and in the opinion of the second respondent, this was something that was not possible.

[54] As stated earlier, these were findings of facts made by the second respondent after considering the oral and documentary evidence before it.

[55] The other contradiction found by the second respondent also related to the testimony of COW2. In his witness statement, COW2 said that after the incident, he met with one Encik Nasir and informed him regarding the incident. In cross examination however, COW2 agreed that his earlier answer was not true given that Encik Nasir was not present there at the time as he had returned home. COW2 then said instead that he actually met with a Encik Yusof.

[56] Yet another contradiction pointed out by the second respondent in the award was that the applicant in their statement in reply at para. 9 had averred the following " ... the claimant returned to the factory half an hour later to appeal to the said security guard ...". This fact was never alluded to by COW2 in his testimony whereas it was COW3 who testified that the first respondent had come and apologised for what had happened.

[57] It was based on a cumulative assessment of the foregoing evidence before it that the second respondent held that it was not safe to conclude that the applicant had succeeded in proving the case against the first respondent on a balance of probabilities. The second respondent had conducted an in depth analysis of the evidence given including the contradictions and inconsistencies and had as shown earlier applied the correct burden in coming to the finding that it did.

[58] It bears repetition that at para. 26 of the award, the second respondent held that even though the case involved a criminal misconduct, the burden resting upon the applicant was not a heavy one of proof beyond a reasonable doubt, to the contrary, the burden was on balance of probabilities. I emphasise this in the face of the ground raised by the applicant that the second respondent had erred in applying the incorrect burden. In applying the correct burden to the factual matrix of the case before it, the second respondent held quite correctly that all the applicant needed to show is that at the time of the acceleration of the first respondent's motorbike, they held a reasonable belief that an offence was committed. Based upon the contradictions and inconsistencies alluded to, it found this not to be the case.

[59] The second respondent was entitled to come to the findings it did in the face of the contradictions and inconsistencies which did not do anything to advance the credibility on the part of the applicant's witnesses. The second respondent had taken into account all relevant matters and did not err in considering irrelevant matters and came to a decision that cannot be said to be unreasonable in the *Wednesbury* sense. I therefore find no cause to hold that the award made by the second respondent is susceptible to judicial review. In respect of the consequential orders made for payment of compensation and backwages, I find no flaw in the decision of the second respondent that merits a review. I therefore dismiss the applicant's application with costs.